Supreme Court, U.S.
FILED

09-928 FEB 1 - 2010

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No. _____

In The
Supreme Court of the United States

SANG KYU HAN AND SEONG SOON HAN,
Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

SANG KYU HAN
SEONG SOON HAN
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Petitioners Pro Se

February 1, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Petitioners, Sang Kyu Han and Seong Soon Han ask that this Court issue a writ of certiorari to make the following determinations:

1. To determine if the Ninth Circuit Court of Appeals has the authority to make a determination on a defense of equitable estoppel where: a) such a defense was not provided the opportunity to be fully litigated in the lower courts; and b) where Petitioners were not given the opportunity to present a complete record for this defense; and

2. To resolve the inconsistent treatment of a defense of equitable estoppels by the United States Court of Appeals in cases involving the United States Government.

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CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Han v. Holder*, Docket No. 06-72473, is attached to this petition as Appendix A at 1a. The agency opinion issued by the Board of Immigration Appeals, In re: Sang Kyu Han and Seoong Soon Han, File Nos. A70-971-660 and A70-971-660 (BIA May 4, 2006), is attached hereto as Appendix B at 4a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment denying the timely submitted petition for review on July 31, 2009. *See* Appendix A at 1a.The mandate was subsequently issued by the Ninth Circuit on December 3, 2009. The order denying review of the agency appeal is attached hereto as Appendix A at 1a. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decision below served to deprive Mr. and Mrs. Han of their rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person . . . shall be deprived of life, liberty, or property, without due process of law."

I. STATEMENT OF THE CASE

Mr. Han and Mrs. Han, both Korean immigrants, entered the United States in the 1980s. Their Notice to Appear dated April 2, 2003 charged both with removal pursuant to INA §§237(a)(1)(A) and 212(a)(7)(A)(i)(I). (R:527-529, 546-548). On June 24, 2005 the Immigration Judge ordered removal of Petitioners. *See* Appendix C at 8a. On June 27, 2005, Petitioners, through their counsel, moved the Board of Immigration Appeals ("BIA") to reconsider the Immigration Judge's decision removing Petitioners. The motion to reconsider was made on the grounds that the government should have been estopped from charging respondents with removability pursuant to INA §§237(a)(7)(A)(i)(I) and 237(a)(1)(A) based on government's unclean hands for its involvement in fraud. On May 4, 2006 the BIA issued an order affirming the Immigration Judge's decision in this matter. *See* Appendix B at 4a.

II. SUMMARY OF ARGUMENT

Mr. and Mrs. Han hereby assert that the Immigration Judge, in contravention with precedent of the Supreme Court of the United States, determined that no authority existed to make a determination on a defense of estoppel. This erroneous finding by the Immigration Judge resulted in a defective record that failed to contain the necessary evidence and facts to support Mr. and Mrs. Han's estoppel defense. This record failed to provide both the Board of Immigration of Appeals and the Court of Appeals for the Ninth Circuit with a record for proper review of the defense of estoppel.

Mr. and Mrs. Han further assert that the Court of Appeals for the Ninth Circuit not only based its analysis of a defense of estoppel on a deficient record, but also applied an analysis inconsistent with the authority set out by the Supreme Court of the United States. The practical result of this decision will be to eliminate the ability to apply a defense of estoppel against the United States Government in an immigration matter.

III. ARGUMENT IN SUPPORT OF PETITION

A. ESTOPPEL DUE TO VIOLATIONS OF DUE PROCESS.

The court found in the *Matter of Thornburgh*, 869 F.2d 1503, 1512 (D.C. Cir. 1989) that the government may be estopped from deportation for violations of due process protections of applicants. The failure to comply with the due process rights of Appellants for deportation should result in the estoppel of claims of deportation. Implications of wrongdoing through violations of due process cannot lead to deportation. The DHS should be estopped from deporting Appellants based on the violations of due process suffered by Petitioners.

B. THE DHS SHOULD BE ESTOPPED FROM REMOVAL OF PETITIONERS.

Estoppel is appropriate only where the government committed affirmative misconduct and not merely false processing functions. *Santamaria-Ames v. INS*, 104 F.3d 1127 (9th Cir. 1996); *Cadwalder v. Andrus*, 45 F.3d 297 (9th Cir. 1995). Petitioners have been entangled within the bribery and fraud convictions of

a former INS agent. This entanglement resulted in the prosecution by the DHS of removal of Petitioners. The criminal misconduct by the agent of the Government resulted in Petitioners prosecution for removal.

Claims of estoppel against the government apply only when the government wrongful acts will cause serious injustice and the public's interest will not suffer undue damage by imposition of the liability. *Morgan v. Heckler,* 779 F.2d 544 (9th Cir. 1985), *Mukherjee v. INS*, 793 F.2d 1006 (9th Cir. 1986). Enforcement of deportation of Petitioners will result in serious injustice to Petitioners who have created successful lives in the United States based on their reliance of the issued immigration status. Similarly, the public's interest is served by allowing Petitioners to remain in the United States and not sever their relationships with this country that include business, education and societal ties. Estoppel is appropriate to prevent severe injustice to Petitioners. *U.S. v. Omdahl*, 104 F.3d 1143 (9th Cir. 1997); *Jaa v. INS*, 779 F.2d 569 (9th Cir. 1986). Petitioners will suffer severe injustice if they are forced to move to South Korea after spending more than fifteen years in the United States building a new and permanent life.

No evidence has been presented that shows that Petitioners were aware of the bribery and fraud committed by Sustaire. Estoppel of actions by the Government is appropriate where Petitioners were ignorant of the true criminal actions committed by the Government but relied on those actions as true. *S&M Inv. Co. v. Tahoe Regional Planning Agency*, 911 F.2d 324 (9th Cir. 1990). Petitioners relied on the issuance of the immigration papers and lived a productive life

in the United States at the cost of terminating their life in South Korea prompted by the issuance of their immigration papers in the United States. The Government should be estopped from shattering these stable lives and forcing Petitioners to leave this country and begin new lives in another country where they don't have long term ties.

CONCLUSION

For the reasons set forth above, Petitioners request that this Court assume jurisdiction over this case, and find that Petitioners' appeal should be granted and that the decision of the BIA and the Immigration Judge be overturned and deportation actions be terminated based on a defense claim of estoppel.

Respectfully submitted,

SANG KYU HAN and
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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-72473
Agency Nos. A070-971-660
A070-971-661

[Filed July 31, 2009]

SANG KYU HAN; SEONG SOON HAN,)
)
Petitioners,)
)
v.)
)
ERIC H. HOLDER Jr., Attorney General,)
)
Respondent.)

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submitted July 29, 2009**

Before: WALLACE, LEAVY, and HAWKINS, Circuit Judges.

Sang Kyu Han and his wife, natives and citizens of South Korea, petition for review of the Board of Immigration Appeals' order dismissing their appeal from an immigration judge's order of removal. We have jurisdiction pursuant to 8 U.S.C. § 1252, and we deny the petition.

We reject petitioners' contention that the government failed to establish removability by clear and convincing evidence, because petitioners conceded removability. *See Shin v. Mukasey*, 547 F.3d 1019, 1024 (9th Cir. 2008).

We also reject petitioners' contention that the government should be equitably estopped from ordering their removal. Although a government employee, Leland Sustaire, issued petitioners' fraudulent alien registration cards, the record shows petitioners were not "ignorant of the true facts" when they procured the cards, *id.* at 1025, and "[i]n any event, estoppel against the government is unavailable where petitioners have not lost any rights to which they were entitled," *Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir. 2000).

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Finally, we find no defects amounting to a due process violation. *See Shin*, 547 F.3d at 1024-25; *Hong v. Mukasey*, 518 F.3d 1030, 1035-36 (9th Cir. 2008).

PETITION FOR REVIEW DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A70 971 660 - San Francisco
A70 971 661

Date: MAY 04 2006

In re: SANG KYU HAN
SEONG SOON HAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Alex C. Park, Esquire

ON BEHALF OF DHS: Michael D. Steinberg
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section

212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact (both respondents)(withdrawn)

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)]- Inadmissible at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document (both respondents)

Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status (both respondents)

APPLICATION: Termination

ORDER:

PER CURIAM. The respondents, a husband and wife, have appealed from the Immigration Judge's decision dated June 24, 2005.

This case stems from the illegal actions of a Department of Homeland Security (DHS) employee, who engaged in a criminal conspiracy to grant lawful status to aliens not otherwise eligible to adjust their status (I.J. at 1-2; Exhs. 2-5). The respondents in this matter conceded removability for having been

inadmissable at the time of entry or adjustment of status under section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), because they were not in possession of valid immigrant visas or entry documents, and withdrew all applications for relief (Tr. at 17-18).

Because the respondents conceded removability, we reject their arguments on appeal that the DHS has not sustained its burden of proof regarding the charge, including the arguments that their Due Process rights were violated by the DHS's failure to link the DHS employee's fraud to the respondents. We also independently find that the Immigration Judge correctly sustained the charge of removability for lack of possession of valid entry documents based upon clear and convincing evidence. *See* section 240(c)(3) of the Immigration and Nationality Act 8 U.S.C. § 1229a(c)(3).

The respondents also argue that the Immigration Judge erred because there is no link between the respondents and the DHS employee's fraud. We note, however, that the DHS withdrew the fraud charge against the respondents and such a link is not required to establish that the respondents were not in possession of the requisite documents under section 212(a)(7)(A)(i)(I) of the Act, particularly where the respondents have conceded removability.

The respondents' remaining arguments are essentially a request for equitable estoppel against the DHS, in which they contend that, because a DHS employee conferred lawful status upon them, they should be entitled to retain that status. We reject this argument. The United States Circuit Court of Appeals

for the Ninth Circuit, under whose jurisdiction this case arises, has agreed with this Board's conclusion that we have no jurisdiction over claims of equitable estoppel *See Chang v. United States*, 327 F.3d 911, 924 (9th Cir. 2003) (*citing Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-39 (BIA 1991)). Further, the Ninth Circuit has held that "estoppel cannot be invoked against the government because of the unauthorized acts of its agents." *Saulque v. United States*, 663 F.2d 968, 976 (9th Cir. 1981) (internal citation omitted). Therefore, even were we empowered to adjudicate claims of equitable estoppel, no valid claim would lie where, here the DHS employee committed criminal acts, and thus behaved well beyond his valid authority. The respondents have not ordered any other appellate argument warranting a reversal of the Immigration Judge's order of removal.

/s/
FOR THE BOARD

APPENDIX C

IMMIGRATION COURT
550 KEARNY ST., SUITE 800
SAN FRANCISCO, CA 94106

In the Matter of: Case: A70 971 660
Respondent IN REMOVAL PROCEEDINGS

Sang Kyu Han

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 6/24/05. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[✓] The respondent was ordered removed from the United States to South Korea.

* * *

Appeal waived Reserved (A) / I / B
Appeal due by: 7/25/05

/s/
Anthony S. Murry
Immigration Judge

Date: 6/24/05

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL [✓] PERSONAL SERVICE [ ]

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [✓] ALIEN'S ATTY/REP [✓] INS-

DATE: 6/27/05 BY: COURT STAFF Ne

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ]

0009f/825/akl

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Francisco, California

June 24, 2005

File No.: A 70 971 660
A 70 971 661

In the Matter of)
)
SANG KYU HAN)
SEONG SOON HAN)
)
Respondents)

IN REMOVAL PROCEEDINGS

CHARGE: Section 237 (a) (1) (A) - Alien not in possession of valid documents.

APPLICATION: None.

ON BEHALF OF RESPONDENTS:
Alex Park

ON BEHALF OF SERVICE:

ORAL DECISION OF THE IMMIGRATION JUDGE

The two respondents in these connected cases are natives and citizens of South Korea.

This is one of a number of so-called Sustaire cases in which these respondents, as well as many other people, received green cards that were fraudulently issued as part of a criminal conspiracy entered into by former INS employee Leland Sustaire.

The respondents have admitted all of the factual allegations of the Notice to Appear and conceded the sole charge of removability. In substance, based on the extensive documentary record that was submitted by the parties and on which the case was submitted, The respondents acknowledge, as they should based on the evidence, that the green cards in their possession at this time were not validly issued do not confer upon them lawful pemanent resident status.

Mr. Sustaire entered into a conspiracy with a group of individuals who were Korean-American. His coconspirators persuaded individuals such as the respondent that green cards could be obtained by the payment of fees for lawyers and other processing and clerical matters. In reality, Mr. Sustaire and the coconspirators took the money paid by people, such as the respondents, and split it among themselves. And these funds were, in fact, bribes to Mr. Sustaire who then misused his authority as an INS officer to cause the issuance of facially valid green cards. Mr. Sustaire, however, did not perform background checks, conduct interviews or have the required documentation for the issuance of the green cards.

Mr. Sustaire has been convicted for his criminal activity, as have all his coconspirators. Nevertheless, the green cards that he issued are not valid green cards. And, as noted above, the respondents do not dispute this fact.

Because the respondents are not in possession of valid Immigration documents and have not made application for any relief, the charge of removability must be sustained. the rspondents have asserted that the Government should be estopped from removing them because Mr. Sustaire, during the vast majority of time the conspiracy was in operation, was a Government employee and the Government, therefore, has unclean hands. Estoppel, however, is an equitable doctrine, and this administrative tribunal does not have general equity power and no jurisdiction and no authority, as far as the Court is aware, to estop the Government. This issue is, however, preserved for appeal.

Based on the entire record, the order in both cases will be that the respondents are ordered removed to South Korea.

Appeal is reserved for both respondents.

/s/
ANTHONY S. MURRY
Immigration Judge

RECEIVED
DEPARTMENT OF JUSTICE

JAN 13 2006

EXECUTIVE OFFICE
IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE ANTHONY MURRY, in the matter of:

SANG KYU KAN
SEONG SOON HAN

A 70 971 660
A 70 971 661

San Francisco, California

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/
Judith Moore, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

December 23, 2005
(completion date)

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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-72473
Agency Nos. A070-971-660
A070-971-661

[Filed November 25, 2009]

SANG KYU HAN; SEONG SOON HAN,	)
	)
Petitioners,	)
	)
v.	)
	)
ERIC H. HOLDER Jr., Attorney General,	)
	)
Respondent.	)
	)

ORDER

Before: WALLACE, LEAVY, and HAWKINS, Circuit Judges.

Petitioners' petition for panel rehearing is denied.